***THE HON'BLE SRI JUSTICE P.S.NARAYANA**

+ WRIT PETITION Nos. 25617 and 25600 of 2006

%Dated 27.12.2007

Imperial Tubes Private Limited.

..... PETITIONER

AND

$ Rashtriya Ispat Nigam Limited and others.

.....RESPONDENTS

Counsel for the Petitioner: Sri Vilas V Afzul Purkar

Counsel for the Respondents 1 to 3: Sri V.Ravindeer Rao

Counsel for the Respondent 4: Assistant Solicitor General

< GIST:

> HEAD NOTE:

? Cases referred:

1. 2004(3) SUPREME COURT CASES 553
2. AIR 1974 SUPREME COURT 1265
3. AIR 1984 SUPREME COURT 29
4. AIR 1997 SUPREME COURT 2557

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THE HON'BLE MR JUSTICE P.S.NARAYANA

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COMMON ORDER:

1. Heard Sri Vilas V Afzul Purkar, the learned Senior Counsel representing the petitioner, Sri V. Ravinder Rao, the learned counsel representing respondents 1 to 3 and the learned Assistant Solicitor General representing respondent No.4.

2. W.P.No.25617 of 2006 is filed praying for a writ or order or direction in the nature of Mandamus, to declare the action of the respondents in appropriating the payment receivable by the petitioner towards other contracts against the risk purchase of the petitioner's contract, as communicated and evidenced by the letter of respondent No.1 bearing No.Pur/2.63.058/059/8883 dated 01.11.2006 impugned herein as illegal, arbitrary and non-est in the eye of law and consequently direct the respondents to forthwith refund the said appropriated amount together with costs of the writ petition.

3. W.P.No.25600 of 2006 is filed praying for a writ or order or direction in the nature of Mandamus, to declare the action of the respondents in appropriating the payment receivable by the petitioner towards other contracts against the risk purchase of the petitioner's contract, as communicated and evidenced by the letter of respondent

No.1 bearing No.Pur/2.63.058/059/8883 dated 01.11.2006 impugned herein, as illegal arbitrary and non-est in the eye of law and consequently direct the respondents to forthwith refund the said appropriated amount together with costs of the writ petition.

4. Sri Vilas V Afzul Purkar, the learned Senior Counsel representing the petitioner had taken this Court through the contents of the affidavits filed in support of the writ petitions and would maintain that in the facts and circumstances, the action of the respondents in appropriating the payment receivable by the petitioner towards other contracts against the risk purchase of petitioner's contract cannot be sustained. Learned Senior Counsel also would maintain that the stand taken by the respondents to the effect that the writ petitions are not maintainable cannot be sustainable, especially in the light of the view expressed by the Apex Court in **ABL INTERNATIONAL LTD v. EXPORT CREDIT GUARANTEE CORPN. OF INDIA LTD**[1]. The learned Senior Counsel further would maintain that in the light of the similarity of clauses in the present writ petitions and also that specified in **UNION OF INDIA v. RAMAN IRON FOUNDRY**[2], the view expressed by the Apex Court in the said decision is to be made applicable. The learned Senior Counsel also had drawn the attention of this Court to the decisions of the Apex Court in **H.M.K.ANSARI & CO. v. UNION OF INDIA**[3] and **M/S. SANT RAM & CO. v. STATE OF RAJASTHAN**[4] and would maintain that the clauses, which had been discussed in the said decisions being cited different, the decision of the Apex

Court in **UNION OF INDIA**'s case (2 supra) is to be preferred to that of the other decisions in **H.M.K.ANSARI & CO.**'s case (3 supra) and **M/S. SANT RAM**'s case (4 supra).

5. Per contra, Sri V. Ravinder Rao, the learned counsel representing respondents 1 to 3 had taken this Court through the contents of the common counter affidavit and would maintain that in the light of the facts and circumstances, the writ petitions are not maintainable. The learned counsel also would maintain that even if it is to be taken as a subsequent cause of action, the petitioner is at liberty to invoke arbitration clause. Viewed from any angle, the writ petitions are liable to be dismissed.

6. This Court issued Rule Nisi on 20.12.2006. The reliefs prayed for had already been specified supra.

7. It is averred that the 1st respondent is a Government Company within the meaning of Section 617 of the Companies Act, 1956 and is an instrumentality of the State being Union of India, 4th respondent herein. The 1st respondent and officers of the 1st respondent which is a State and/or other authority within the meaning of Article 12 of the Constitution of India and as such are amenable to the writ jurisdiction of this Court. It is also stated that the 1st respondent owns and operates Visakhapatnam Steel Plant, which is claimed to be the largest shore based steel plant in the country. For its aforesaid steel plant the 1st respondent requires continuous annual supply of ERW pipes. Having regard to its aforesaid requirement the 1st respondent from time to time invites tenders for purchase of ERW pipes.

8. Further, it is averred that on or about October

10, 2002 the 1st respondent invited a tender for entering into a rate contract for supply of ERW pipes for a period of 12 months. A copy of the said invitation to tender had been placed before this Court. Pursuant to negotiations, a rate contract was entered into by and between the petitioner and the 1st respondent in respect of supply of 17 items of ERW pipes. A copy of the said rate contract also had been placed before this Court. It is further specified that the said rate contract, *inter alia,* provided as follows:-

> "11. Delivery Schedule: Order shall be confirmed by the PURCHASER based on the requirement and materials shall be supplied within 60 days".
> "12. Period of the Contract: The rate contract shall be valid upto 28.02.2004. The prices shall be confirmed and valid for the orders placed upto 28.02.2004".

9. Pursuant to the said Rate contract, the 1st respondent from time to time issued purchase orders upon the petitioner for supply of the required quantity of ERW pipes. The said purchase orders were referred to as "Acceptance to Tender". Such acceptance to tender (purchase orders) are 4 in number and were issued on March 24, 2003, May 24, 2003, July 26, 2003 and September 22, 2003. Pursuant to the purchase orders, the petitioner from time to time supplied to the 1st respondent E.R.W. pipes of various descriptions. On account of reasons beyond the control of the petitioner, supply of certain quantity of E.R.W. pipes could not be executed by it. It appears that on account of failure of supply by the petitioner, the 1st respondent resorted to make risk purchase on

account of the petitioner from alternative sources. Such risk purchase appears to have been made by the 1st respondent on January 9 2004, by order No.Pur.3.63.008/0613 and on May 13, 2004 by Purchase Order No.Pur.4.63.0016/2737 from one M/s Jindal India Limited totaling to Rs.24,81,882.60ps.

10. It is further stated that for items which are on account of risk purchase made by the 1st respondent on January 9, 2004 within the validity period of the Rate Contract which expired on 28.02.2004, the petitioner duly compensated the respondent No.1 by making deposit of Rs.1,.36,344/- by a Demand Draft NO.112607 dated 16.01.2005 reimbursing the additional cost incurred by the 1st respondent in respect of the bill raised by it in this behalf.

11. It is also averred that the purported risk purchase made by the 1st respondent to the petitioner's account on May 13, 2004 for Rs.24,81,881.60 ps. for the balance quantity of materials not supplied by the petitioner as per the Rate Contract is bad, wrongful, arbitrary and illegal, inasmuch as the said purported risk purchase was made by respondent No.1 beyond the validity period of the said rate contract, which expired on 28.02.2004. It is significant that even after having resorted to the purported risk purchase, the respondents continued to demand deliver of the quantity of E.R.W. pipes, despite the expiry of the period of the Rate Contract, as is seen from letters dated March 29, 2004, April 30, 2004, July 3, 2004 and September 6, 2004. The said letters had been placed before this Court.

12. It is also averred that the demand made by

the respondents dated January 29, 2005 from the petitioner for a sum of Rs.24,81,882.60 ps. being the difference of the price in respect of the purported risk purchase made by the respondent No.1 is bad and illegal, inasmuch as the purchase was made beyond the validity period of the rate contract. The petitioner by letter dated 21.02.2005 replied to the letters dated 29.01.2005 and 08.02.2005 disputing the claim of the respondents. Copies of the same had been placed before this Court. In fact, the purported dispute by and between the parties, the 1st respondent had invoked the arbitration clause provided in the "General Conditions of Contract for Supply" by referring the matter to the India council of Arbitration, New Delhi, knowing the same to be disputed amounts between the parties.

13. It is further averred that in or about July, 2006, the 1st respondent filed its Statement of Claim against the petitioner before the Indian Council of Arbitration, New Delhi. A copy thereof had been placed before this court. Pursuant to the direction given by Indian Council of Arbitration, New Delhi, the petitioner has duly filed its Statement of Defence denying and disputing the purported claims raised by the respondents. The petitioner further made payment of Rs.48,750/- towards the tentative cost of the arbitration proceedings, as directed by the said Indian Council of Arbitration, New Delhi.

14. It is also stated that on or about September 30, 2006 and October 17, 2006, the respondent requested the Indian Council of Arbitration, New Delhi, for extension of time to deposit the cost of arbitration. The 1st respondent

further requested an extension till October 31, 2006. Copies of the said two letters of request made by respondent No.1 dated September 30, 2006 and October 17, 2006 had been placed before this court. On or about November 1, 2006 the respondents informed the Indian Council of Arbitration, New Delhi, that 1st respondent was withdrawing its request for initiation of arbitration in the matter as it had recovered its dues. A letter, dated November 1, 2006 written by the Assistant Manager of 1st respondent to the Registrar, Indian Council of Arbitration, New Delhi, a copy whereof was endorsed to the petitioner, had been placed before this Court. In terms of the said letter, it is evident that respondent No.1 having initiated the arbitration proceedings as per the contract suddenly backtracked and wrongfully recovered the disputed amount from the petitioner's other ongoing contracts.

15. On or about November 2, 2006 the petitioner received a fax message being letter dated November 02,2006 sent on behalf of 1st respondent, a copy whereof had been placed before this Court. From the said message, it appears that the respondent No.1 has purportedly invoked Article 9 of the General Conditions for Supply and has deducted and recovered the purported claim amount from out of the amount payable to the petitioner by it from other contracts between the parties.

16. It is further states that the purported deduction and/or recovery made by the 1st respondent is wrong, arbitrary and illegal inasmuch as such recovery and /or deduction was made during the pendency of the

arbitration proceedings between the parties without any adjudication as to whether any sum is due and payable by the petitioner to 1st respondent. In any event after invocation of the arbitration clause and initiation of arbitration proceedings it was and is not open to the respondents to take unilateral and convenient stand and appropriate the petitioner's receivables under the garb of Article 9 of the General Conditions of Contact for Supply. It is reiterated that the 1st respondent knowing fully that the amount was disputed between the parties ought not to have taken recourse to Article 9 of the General Conditions of Contract for the supply, which has no application to disputed claims.

17. It is also averred that having regard to the provision of the said Article 9 of the General Conditions of Contract for supply and on a true, proper and correct interpretation thereof, the purported amount claimed by the 1st respondent is not and cannot be said to be "recoverable from and payable by the Contractor", having regard to the pendency of the arbitration proceedings between the parties. The 1st respondent and its officers are bound, liable and obliged to act fairly, reasonably in all its dealings with third parties including the petitioner, which the respondents have failed and neglected to do. It is also stated that the purported acts and conduct of the respondents is null and void, wrongful, arbitrary and illegal and the respondents ought to be compelled to act in accordance with law

18. It is further averred that the petitioner has already demanded justice from the 1st respondent by its

letter dated November 10, 2006 and a copy thereof had been placed before this court. However, the respondent, having received the same, had not responded. In the light of the said facts, the petitioner is left with no other option, except to approach this Court by invoking Article 226 of the Constitution of India.

19. In the common counter-affidavit, it is stated that the relief sought in the Writ Petitions is in the realm of a non-statutory contract. The grievance of the petitioner relates to an action taken by the respondent in terms of a non-statutory contract. Hence a public law remedy under Article 226 of Constitution of India cannot be invoked. On this ground, the writ petitions are liable to be dismissed without going into the merits of the dispute. It is stated that the pleadings in paras 3 to 7 relate to contracts between the parties for supply of ERW pipes and terms thereof, which are evident from the agreements and need not be traversed.

20. It is also stated that in the contract dated 27.01.2003 the respondent issued 6 purchase orders and not five as mentioned by the petitioner. The 6th purchase order is dated 28.04.2003. It is not correct to allege that the petitioner supplied ERW pipes against all the purchase orders. It is also incorrect to contend that non-supply of certain quantity of pipes was on account of reasons beyond the control of the petitioner. On account of petitioner's default in making the supplies, the respondent had no alternative but to resort to risk purchase.

21. It is further submitted that as per the rate

contract the prices are firm and orders are to be placed within the validity of the contract i.e., before 31.01.2004 and 28.02.2004 respectively, and need to be executed as per the terms and conditions of the purchase order. It is not in dispute that the non-executed orders were placed on the petitioner within the validity period of the contract as per the agreed terms and conditions. Hence the petitioner was contractually under an obligation to make the supplies, failure to supply attracted the risk purchase action. The petitioner has compensated the respondent for part of risk purchase that was undertaken within the validity period of the rate contract. Some of the risk purchases were made beyond the validity period of the contract, though the orders for supply were made and defaulted within the validity period of the contract. Such risk purchases were made by the respondent on 13.05.2004 and 17.05.2004 respectively. These purchases also represent the orders placed within the validity period of rate contract. Having committed default in supplies, the petitioner is under a contractual obligation to compensate the respondent for the additional cost incurred in exercising the risk purchase option.

22. It is also stated that in terms of the contract, orders for supply can be placed any time during its validity period and the contract provides for supplies to be made within 60 days from the date of the order. Therefore, the dates of supply would extend beyond the validity period of the contract for orders placed during the 2 months of contract. As a routine notices were sent to the petitioner for pending orders beyond the contractual period. Such notices do not by themselves operate against the action of

risk purchase invoked earlier. The claim of the respondent in both the cases relating to the difference in price between the contractual rate and risk purchase rate is just and permissible in law.

22. It is further stated that in view of the default and the consequential loss incurred by the respondent on invocation of risk purchase, the arbitration clause for proper adjudication of the claim and for recovery of the amount was invoked. At the time of invocation of Arbitration Clause the respondent was not holding any amount payable to the petitioner. Contention of the petitioner that it has submitted the statement of defence is not correct. No such statement was served to the respondent after invocation of Arbitration Clause and reference of the matter to the Arbitrator. After invocation of the arbitration clause, the respondent found in its possession certain amounts payable to the petitioner. To ensure that the loss suffered by the respondent on account of risk purchase is mitigated, Clause 9 of General Conditions of contract was invoked and adjusted the amount payable to the petitioner against other contracts. Even after invocation of Arbitration Clause the provisions of General Conditions of Contract can still be invoked. The contract provides for different options to be exercised by 1st respondent to recover the amounts due to it. Hence the 1st respondent having invoked Clause 9 of General Conditions of Contract, has withdrawn the Arbitration proceedings. Such an action is well within the terms of the contract. The 1st respondent being the “Dominus Litus” in the Arbitration proceedings, it is open to withdraw the Arbitral proceedings,

since its claim is satisfied through other valid means available under the contract. The 1st respondent has already sent a reply dated 13.12.2006 to the petitioner's letter dated 10.11.2006 and hence, the dismissal of these writ petitions had been prayed for.

23. The relevant material papers, which had been placed before this Court, the correspondence and letters would reflect certain factual controversies between the parties. Be that as it may, the learned Senor Counsel representing the petitioner in both the writ petitions had placed strong reliance on **ABL INTERNATIONAL LTD**'s case (1 supra), wherein the Apex Court observed as under:

> 16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the respondents, and should have proceeded to try the petition instead of relegating the appellants to a separate suit".
>
> 19. Therefore, it is clear from the above enunciation of law that merely because one of the parties to the litigation raises a dispute in regard to the facts of the case, the Court entertaining such petition under Article 226 of the Constitution is not always bound to relegate the parties to a suit. In the above case of *Gunwant Kaur* this Court even went to the extent of holding that in a writ petition, if the facts require, even oral evidence can be taken. This clearly shows that in an appropriate case, the writ Court has the jurisdiction to entertain a writ petition involving disputed questions of fact and there is no absolute bar for entertaining a writ petition even if the same arises out of a contractual obligation and/or involves some disputed questions of fact.
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> 27. From the above discussion of ours, the following legal

principles emerge as to the maintainability of a writ petition:

a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

c) A writ petition involving a consequential relief of monetary claim is also maintainable.

51. From the terms of the contract, we have noticed in clause 6, as amended by the addendum, consideration by way of barter of goods is not the sole mode of payment of consideration. The said clause contemplates alternate modes of payment of consideration, one of them being by barter of goods and the other by cash payment in US $. The terms of the insurance contract which were agreed between the parties were after the terms of the contract between the exporter and the importer were executed which included the addendum, therefore, without hesitation we must proceed on the basis that the first respondent issued the insurance policy knowing very well that there was more than one mode of payment of consideration and it had insured failure of all the modes of payment of consideration. From the correspondence as well as from the terms of the policy, it is noticed that existence of only two conditions has been made as a condition precedent for making the first respondent Corporation liable to pay for the insured risk, that is : (i) there should be a default on the part of the Kazak Corporation to pay for the goods received; and (ii) there should be a failure on the part of the Kazakhstan Government to fulfil their guarantee. This is clear from the terms of the insurance contact read with the letter of the first respondent dated 8-9-1993 wherein at clause 3-A, it is stated: “Our liability will arise only after default has been established on the guarantee of the Ministry”. From the above, it is clear that both the grounds as put forth by the learned counsel for the respondent before

us as well as in the two letters of repudiation issued by the first respondent are unsustainable. In our opinion, the first respondent insured the export risk of the appellants in regard to the non-payment of the consideration for the tea exported, whether it arose from the non-fulfilment of the barter clause or from the non-fulfilment of the cash payment clause. The argument advanced on behalf of the respondent that the appellants refused to accept the barter by goods offered by the Kazak Corporation which amounted to a default under the contract on the part of the appellants has no legs to stand in view of the clear language of the amended clause 6 of the agreement which as noted above, states that the obligation of the buyer, namely, the Kazak Corporation to pay for the goods received by it in US $ arises when payment by barter fails for “any reason whatever”. The use of the words “any reason whatever” in the said amended clause includes the reasons of refusal by the appellants to accept the goods offered in barter. On the fact of the said language of the amended clause, there could be no room for two opinions at all in regard to the liability of the first respondent to pay for the loss suffered by the appellants even in cases where payment by barter fails at the instance of the appellant. The learned counsel for the respondent contended that for a correct interpretation of this amended clause and the other clauses of the contracts i.e., the contract of export and the contract of insurance, between the parties there is need for oral evidence being led without which a proper interpretation of this clause is not possible, therefore, it is a fit case in which the appellants should be directed to approach the civil Court to establish their claim. We find no force in this argument. We have come to the conclusion that the amended clause 6 of the agreement between the exporter and the importer on the fact of it does not give room for a second or another construction than the one already accepted by us. We have also noted that reliance placed on sub-clause (d) of the proviso to the

insurance contract by the Appellate Bench is also misplaced which is clear from the language of the said clause itself. Therefore, in our opinion, it does not require any external aid, much less any oral evidence to interpret the above clause. Merely because the first respondent wants to dispute this fact, in our opinion, it does not become a disputed fact. If such objection as to disputed questions or interpretations is raised in a writ petition, in our opinion, the courts can very well go into the same and decide that objection if facts permit the same as in this case. We have already; noted the decisions of this Court which in clear terms have laid down that mere existence of disputed questions of fact ipso facto does not prevent a writ court from determining the disputed questions of fact.

24. A two Judge Bench of the Apex Court in **UNION OF INDIA**'s case (2 supra) observed at paragraphs 7 and 9 as under:

7. The first thing that strikes one on looking at clause 18 is its heading which reads: "Recovery of Sums Due". It is true that a heading cannot control the interpretation of a clause if its meaning is otherwise plain and unambiguous, but it can certainly be referred to as indicating the general drift of the clause and affording a key to a better understanding of its meaning. The heading of Clause 18 clearly suggests that this clause is intended to deal with the subject of recovery of sums due. Now a sum would be due to the purchaser when there is an existing obligation to pay it in praesenti. It would be profitable in this connection to refer to the concept of a 'debt', for a sum due is the same thing as a debt due. The classical definition of 'debt' is to be found in Webb v. Stenton, (1883) 11 QBD 518 where Lindly, I.J., said; ".....a debt is a sum of money which is now payable or will become payable in the future by reason of a present obligation." There must be debitum in prasesenti;

solvendum may be in prasenti or in futuro - that is immaterial. There must be an existing obligation to pay a sum of money now or in future. The following passage from the judgment of the Supreme Court of California in People v. Arguello, (1869)37 Calif. 524, which was approved by this Court in Kesoram Industries v. Commr. of Wealth Tax, (1966) 2 SCR 688 = (AIR 1966 SC 1370), clearly brings out the essential characteristics of a debt:

"Standing alone, the word 'debt' is as applicable to a sum of money which has been promised at a future day as to a sum now due and payable. If we wish to distinguish between the two, we say of the former that it is a debt owing, and of the latter that it is a debt due."

This passage indicates that when there is an obligation to pay a sum of money at future date, it is a debt owing but when the obligation is to pay a sum of money in praesenti it is a debt due. A sum due would, therefore, mean a sum or which there is an existing obligation to pay in prasenti, or in other words, which is presently payable Recovery of such sums is the subject-matter of Clause 18 according to the heading. That is the dominant idea running through the entire Clause 18.

9. Having discussed the proper interpretation of clause 18, we may now turn to consider what is the real nature of the claim for recovery of which he appellant is seeking to appropriate the sums due to the respondent under other contracts. The claim is admittedly one for damages for breach of the contract between the parties. Now, it is true that the damages which are claimed are liquidated damages under clause 14, but so far as the law in India is concerned, there is no qualitative difference in the nature of the claim whether it be for liquidated damages or for unliquidated damages Section 74 of the Indian Contract Act eliminates the somewhat elaborate refinements made under the English common law in distinguishing between stipulations providing for payment of liquidated damages and stipulations in the nature of penalty. Under the common law a genuine preestimate of damages by mutual agreement is

regarded as a stipulation naming liquidated damages and binding between the parties; a stipulation in a contact in terrorem if a penalty and the Court refuses to enforce it, awarding to the aggrieved party only reasonable compensation. The Indian Legislature has sought to cut across the web of rules and presumptions under he English common law, by enacting a uniform principle applicable to all stipulations naming amounts to be paid in case of breach, and stipulations by way of penalty, and according to this principle, even if there is a stipulation by way of liquidated damages, a party complaining of breach of contract can recover only reasonable compensation for the injury sustained by him, the stipulated amount being merely the outside limit. It, therefore makes no difference in the present case that the claim of the appellant is for liquidated damages. It stands on the same footing as a claim for unliquidated damages. Now the law is well settled that a claim for unliquidated damages does not give rise to a debt until the liability is adjudicated and damages assessed by a decree or order of a Court or other adjudicatory authority. When there is a breach of contract, the party who commits the breach does not eo instanti incur any pecuniary obligation, nor does the party complaining of the breach become party. The only right which the party aggrieved by the breach of the contract has is the right to sue for damages. That is not an actionable claim and this position is made amply clear by the amendment in Section 6(e) of the Transfer of Property Act, which provides that a mere right to sue for damages cannot be transferred. This has always been the law in England and as far back as 1858 we find it stated by Wightman, J., in Jones v. Thompson, (1858) 27 LJQB 234. "Ex parte Charles and several other cases decide that the amount of a verdict in an action for unliquidated damages is not a debt till judgment has been signed." It was held in this case that a claim for damages does not become a debt even after the jury has returned a verdict in favour of the plaintiff till the judgment is actually delivered. So also in O'Driscoll v. Manchester Insurance Committee, (1915) 3 KB 499. Swinfen Eady, L., J., said in reference to cases where the

claim was for unliquidated damages "..... in such cases there is no debt at all until the verdict of the jury is pronounced assessing the damages and judgment is given". The same view has also been taken consistently by different High Court in India. We may mention only a few of the decisions, namely, Jabed Sheikh v. Taher Mallik, 45 Cal WN 519 = (AIR 1941 Cal 639); S. Milkha Singh v. M/s. N. K. Gopala Krishna Mudaliar, AIR 1956 Punj 174 Iron and Hardware (India) Co. v. Firm Shamlal and Bros, AIR 1954 Bom 423. Chagla, C. J., in the last mentioned case, stated the law in these terms:

"In my opinion it would not be true to say that a person who commits a breach of the contract incurs any pecuniary liability, nor would it be true to say that the other party to the contract who complains of the breach has any amount due to him from the other party.

As already stated, the only right which he has is the right to go to a Court of law and recover damages. Now, damages are the compensation which a Court of law gives to a party for the injury which he has sustained. But, and this is most important to note, he does not get damages or compensation by reason of any existing obligation on the part of the person who has committed the breach. He gets compensation as a result of the fiat of the Court. Therefore, no pecuniary liability arises till the Court has determined that the party complaining of the breach is entitled to damages. Therefore, when damages are assessed, it would not be true to say that what the Court is doing is ascertaining a pecuniary liability which already existed. The Court in the first place must decide that the defendant is liable and then it proceeds to assess what that liability is. But till that determination there is no liability at all upon the defendant."

This statement in our view represents the correct legal position and has our full concurrence. A claim for damages for breach of contract is, therefore, not a claim for a sum presently due and payable and the purchaser is not entitled, in exercise of the right

conferred upon it under clause 18, to recover the amount of such claim by appropriating other sums due to the contractor. On this view, it is not necessary for us to consider the other contention raised on behalf of the respondent, namely, that on a proper construction of clause 18, the purchaser is entitled to exercise the right conferred under that clause only where the claim for payment of a sum of money is either admitted by the contractor, or in case of dispute, adjudicated upon by a Court or other adjudicatory authority. We must, therefore, hold that the appellant had no right or authority under Clause 18 to appropriate the amounts of other pending bill of the respondent in or towards satisfaction of its claim for damages against the respondent and the learned Judge was justified in issuing an interim injunction restraining the appellant from doing so.

25. A three Judge Bench of the Apex Court in **H.M.K.ANSARI**'s case (3 supra), while overruling the judgment in **UNION OF INDIA**'s case (2 supra), observed at paragraphs 19,20, 26 and 27 as under:

19. On the own case of the appellant that there was no concluded contract between the parties containing an arbitration clause it will be difficult to say that the application for injunction moved by the appellant was for the purpose of and in relation to arbitration proceedings. This apart, the amount due under the pending bills to the appellant was not the subject-matter of the present proceedings and therefore, the injunction order restraining the respondents from withholding the amount due to the appellant under the pending bills in respect of other contracts could not be said to be for the purpose of and in relation to the present arbitration proceedings. In this view of the matter it was not open to the Court to pass the interim injunction restraining the respondents from withholding the amount due to the appellant under pending bills in respect of other contracts.

20. The learned counsel Shri Kacker, however, strongly relied on the following observations of the Court in Union of India v. Raman Iron Foundry, (AIR 1974 SC 1265 at p. 1269) (supra):

"But here the order of interim injunction made by the learned Judge does not expressly or by necessary implication, carry any direction to the appellant to pay the amounts due to the respondent under other contracts. It is not only in form but also in substance a negative injunction. It has no positive content. What it does is merely to injunct the appellant from recovering, suo motu, the damages claimed by it from out of other amounts due to the respondent. It does not direct that the appellant shall pay such amounts to the respondents. The appellant can still refuse to pay such amounts if it thinks it has a valid defence and if the appellant does so, the only remedy open to the respondent would be to take measures in an appropriate forum for recovery of such amounts where it would be decided whether the appellant is liable to pay such amounts to the respondent or not. No breach of the order of interim injunction as such would be involved in non-payment of such amounts by the appellant to the respondent. The only thing which the appellant is interdicted from doing is to make recovery of its claim for damages by appropriating such amounts in satisfaction of the claim. That is clearly within the power of the Court under Section 41 (b) because the claim for damages forms the subject matter of the arbitration proceedings and the Court can always say that until such claim is adjudicated upon, the appellant shall be restrained from recovering it by appropriating other amounts due to the respondent. The order of interim injunction made by the learned Judge cannot, therefore, be said to be outside the scope of his power under Section 41 (b) read with the Second Schedule."

With profound respect we find that the aforesaid observation is incongruous with the proposition of law laid down by this Court just before this observation.

We find it difficult to agree with the observation of the Court that the impugned order in form and substance being in the negative the respondent could refuse to pay such amounts if it thinks it has a valid defence and if it chooses to do so there would be no breach of the injunction order.

26. The headings prefixed to a section or a group of sections in some modern statutes are regarded as preambles to those sections. They cannot control the plain words of the statutes but they may explain ambiguous words. The view is now well settled that the headings or titles prefixed to a section or a group of sections can be referred to in determining, the meaning of doubtful expressions. It is true that the Court is entitled, to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words. The law is clear that those headings cannot be used to give a different effect to clear words in the section where there cannot be any doubt as to the ordinary meaning of the words. The golden rule is that when the words of a statute are clear, plain and unambiguous, that is, they are reasonably susceptible to only one meaning, the Courts are bound to give effect to that meaning irrespective of the consequences, duty of a judge is to expound and not to legislate, is a fundamental rule. If we apply the same principle to the interpretation of clause 18 of the standard form of contract, it would be clear that the clause unequivocally contemplates a claim for the payment and it is not open to the Union of India to appropriate any amount due to the contractor under other pending bills. It does not contemplate the amount due and, therefore, the heading of this clause which talks of only 'Recovery of sums due' will not control Clause 18. The clause in our opinion gives wide powers to the Union of India to recover the amount claimed by appropriating any sum then due or which at any time thereafter may become due to the contractor under other contracts.

27. Clause 18 of the standard form of contract, earlier

was slightly differently worded and it read. 'whenever under this contract any sum of money is recoverable from and payable by the contractor'. But this formula was deliberately and advisedly altered when the present standard form was introduced and instead the words 'whenever any claim for payment of a sum of money arises' were substituted and this change in phraseology indicated that in order to attract the applicability of the present Cl. 18, it was not necessary that there should be a sum of money due and payable by the contractor to the purchaser, but it was enough if there was a mere claim on the part of the purchaser for payment of a sum of money by the contractor irrespective of the fact whether such sum of money was presently due and payable or not. This Court, however, did not attach importance to this aspect of the matter by observing :

"We do not think it is legitimate to construe Cl. 18 of the contract between the parties by reference to a corresponding clause which prevailed in an earlier standard form of contract. This is not a statute enacted by the legislature where it can be said that if the legislature has departed from the language used by it in an earlier enactment, it would be a fair presumption to make that the alteration in the language was deliberate and it was, intended to convey a different meaning. It is a clause in a contract which we are construing and there any reference to a similar or dissimilar clause in another contract would be irrelevant.

26. Further, in **M/S. SANT RAM & CO**'s case (4 supra)**,** a three Judge Bench of the Apex Court observed at paragraphs 4 and 7 as under:

4. In that case, an application under Section 33 of the Arbitration Act had come to be filed and then an application for ad interim injunction was filed. It will, therefore, be clear that to avail the remedy under the provisions of the Code of Civil Procedure, when an

> application for injunction under Section 41(b) read with Schedule is filed, the Court shall have, pending proceedings for the purpose of and in relation to the arbitration proceedings availed through the process of the Court, the same power of making orders in respect of any matters set out in the Second Schedule as it has for the purpose of and in relation to any proceedings before the Court. The initiation of pendency of any proceedings in the Court in relation to the arbitration proceedings would, therefore, be a pre-condition for the exercise of the power by the Civil Court under the Second Schedule of the Act.
>
> 7. It is seen that under Clause (50) of the contract, the appellant has expressly agreed for adjustment of the amount pending with the respondent in respect of the claim under the dispute or any other contract with the Department. Under these circumstances, neither on merits nor on principle of law, we find any illegality in the order passed by the High Court warranting interference.

27. In the light of the views expressed in **H.M.K.ANSARI & CO.**'s case (3 supra) and **M/S. SANT RAM**'s case (4 supra), the petitioner is not entitled to the reliefs prayed for in these writ petitions. However, liberty is given to the petitioner to invoke arbitration clause or to pursue the other appropriate legal remedies. Except making this observation, no positive relief as prayed for can be granted in these writ petitions.

28. Subject to the above observation, the writ petitions are hereby dismissed. No order as to costs.

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(P.S.NARAYANA, J)

Dated: 27.12.2007

Note: L.R.Copy to be marked.

(B/o)
JSU

THE HON'BLE MR JUSTICE P.S.NARAYANA

WRIT PETITION Nos.25617 & 25600 of 2006

Dated:27.12.2007

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[1] 2004(3) SUPREME COURT CSES 553
[2] AIR 1974 SUPREME COURT 1265
[3] AIR 1984 SUPREME COURT 29
[4] AIR 1997 SUPREME COURT 2557